Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,
Appellants,

v.

COMMON CAUSE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, *et al.*,
Appellants,

v.

O. JOHN BENISEK, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF THE FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

The Floyd Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, access to information, and government transparency. The Abrams Institute has an interest in defending robust constitutional protections for the freedoms of speech and press as critical safeguards of our democratic system.

SUMMARY OF THE ARGUMENT

"There is no right more basic in our democracy than the right to participate in electing our political leaders." So this Court observed in the first line of Chief Justice Roberts's First Amendment plurality opinion in *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 191 (2014). It followed that statement by offering five examples of constitutionally protected participation, one of which was voting itself. *Id.* That example was hardly controversial. Voting, after all, is the ultimate form of "speech by citizens on matters of public concern," *Lane v. Franks*, 573 U.S. 228, 235 (2014), and the principal mechanism by which citizens "expressly advocate the election or defeat of a candidate." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320 (2010).

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[1] The parties have consented to the filing of all briefs of amici curiae. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to the preparation or submission of this brief.

Voting thus lies at the heart of First Amendment protection.

Partisan gerrymandering, the practice at issue in these cases, is fundamentally inconsistent with First Amendment principles. These cases arise out of legislation that shapes election districts in a manner designed to predetermine which political party prevails in certain elections. The legislation does this by sorting citizens on the basis of their past expressed political views and targeting those with disfavored views for disfavored treatment. This is nothing less than quintessential, insidious viewpoint discrimination.

Fortunately, settled First Amendment doctrine provides clear, workable standards for rooting out partisan gerrymanders. First Amendment scrutiny is entirely compatible with state legislatures' constitutional authority to regulate the mechanics of voting, and would not preclude consideration of myriad, long-approved districting factors, such as compactness, political subdivisions, contiguity, and communities of interest. Moreover, well-established First Amendment principles provide courts with a manageable and familiar framework for reviewing partisan gerrymandering claims. Nor does the history of this practice, persistently condemned as unconstitutional from the outset, insulate it from First Amendment scrutiny. For the First Amendment does not, in any manner, countenance discrimination against voters on the basis of their viewpoints, and that is precisely what partisan gerrymandering does and is precisely what the First Amendment forbids.

ARGUMENT

I. Partisan Gerrymandering Violates The First Amendment's Protection Of Freedom Of Speech

The First Amendment stands against all "attempts to disfavor certain subjects or viewpoints." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). States are prohibited from regulating speech or expressive conduct "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). States engage in just such prohibited conduct when they establish partisan gerrymanders.

A. Voting Is Core Political Speech

Voting lies at the heart of First Amendment protection. It is the ultimate means "of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). It is the expression of a citizen's views on government, and the principal way of ensuring "that government remains responsive to the will of the people." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). The First Amendment protects picketing, petition-signing, protesting, political expenditures, and even the wearing of arm bands precisely because such activities facilitate speech directed at "the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Voting likewise serves the First Amendment's guarantee "that the individual citizen can effectively participate in and contribute to

our republican system of self-government," as much as any other form of protected political speech. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). As such, the First Amendment necessarily protects the casting of a ballot, for it is the ultimate form of political advocacy and the mechanism by which government is held accountable to the people.

This Court has previously observed that voting constitutes the expression of political views that merit First Amendment protection. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (noting that voters "express their views in the voting booth"); *see also Doe v. Reed*, 561 U.S. 186, 195 (2010) (holding that signing a petition "expresses [a] political view" and "the expression of a political view implicates a First Amendment right"); *id.* at 224 (Scalia, J., concurring) (acknowledging "the existence of a First Amendment interest in voting"). A citizen's vote is an "inherently expressive act" because it is the exercise of a "personal right" to express a view on the preferred outcome of an election. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011); *see also id.* at 133 (Alito, J., concurring) ("Voting has an expressive component in and of itself."). [2] Because the First Amendment safeguards this most basic right to participate in the election of our leaders, it necessarily protects participation through voting at least to the same extent it protects participation by running for office, advocating for a candidate, and contributing to a

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[2] A citizen's vote thus differs from a legislator's vote, which "is the commitment of his apportioned share of the legislature's power," as opposed to the commitment of "a personal right" to the democratic election of a candidate. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125-26 (2011).

campaign. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) (plurality opinion).

Additionally, voting falls well within the ambit of the First Amendment as protected expressive conduct. *See Texas v. Johnson*, 491 U.S. 397, 403 (1989). [3] The act of voting is quintessentially expressive—it seeks "to convey a particularized message . . . and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Votes communicate a clear message to multiple audiences, from candidates to officeholders to ballot counters, all of whom readily understand both the literal meaning of a written or spoken vote and the wider political message that vote conveys.[4] Thus, whether viewed as pure speech or expressive conduct, voting is fully protected by the First Amendment.[5]

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[3] *See also* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 487 (2016) ("Voting . . . plainly expresse[s] a point of view and represent[s] a decision to sign on to a particular idea in the marketplace of ideas or support a particular candidate who best represents the voters' political beliefs.").

[4] Nowhere is this more apparent than in the speech-based rhetoric with which politicians and the media characterize election results as 'voters sending a message,' 'voters saying they want change,' 'voters telling us they're frustrated,' and so forth.

[5] Of course, the First Amendment would guard against viewpoint discrimination in the act of drawing legislative districts even if voting were not fully protected speech or expressive conduct. *See Carrigan*, 564 U.S. at 125 ("We have applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First

The history of voting in the United States confirms that it has always been archetypal political speech. In early America, voting was conducted by voice vote, termed *viva voce*, or by a public show of hands. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992). The *viva voce* method "was not a private affair, but an open, public decision, witnessed by all." *Id.* Election judges would call the name of an individual voter and ask, "for whom do you vote?"—to which the voter would reply "by proclaiming the name of his favorite" candidate. *Doe*, 561 U.S. at 224 (Scalia, J., concurring). Several states held fast to the "oral expression" method of voting up through the Civil War, while others variously replaced the practice of *viva voce* voting with paper ballots. *Id.* at 226.

The switch to paper did not dampen the essential speech element of voting. To the contrary, political parties "used brightly colored paper and other distinctive markings so that the ballots could be recognized from a distance," making the votes a public form of political communication at the polling place. *Id.*; *see also Burson*, 504 U.S. at 200-01. At the end of the nineteenth century, states adopted the Australian secret ballot in a direct effort to protect voters' political speech at the polls from being suppressed or distorted through coercion and intimidation. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (noting that the First Amendment protects anonymous political speech in order "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant

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Amendment.") (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-86 (1992)).

society"). A vote—whether delivered orally or in writing, publicly or anonymously—has always functioned as a form of political speech advocating for the election or defeat of a candidate.

That a vote has a specific legal effect does not alter its status as protected political speech. This Court has confirmed that the "legal effect" of an "expressive activity" does not "deprive[] that activity of its expressive component, taking it outside the scope of the First Amendment." *Doe*, 561 U.S. at 195; *see also id.* at 231 (Thomas, J., dissenting) (underscoring the majority's recognition that expressive activity does not fall "'outside the scope of the First Amendment' merely because 'it has legal effect in the electoral process'"). If the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *McCutcheon*, 572 U.S. at 191, it surely follows that a vote—which translates political advocacy into political representation—receives the highest First Amendment protection. If anything, the legal effect of a vote elevates its status to the apex of protected speech.

B. Partisan Gerrymandering Is Viewpoint Discrimination

It is axiomatic that "the government offends the First Amendment when it imposes . . . burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828. Partisan gerrymanders do just that. Partisan gerrymandering assigns voters to districts on the basis of their political views with the aim of devaluing the votes of disfavored speakers and enhancing the political impact of preferred speech—goals this Court has

emphatically found impermissible in the context of political speech. *See, e.g.*, *Citizens United*, 558 U.S. at 341; *McCutcheon*, 572 U.S. at 191 ("[T]he political participation of some" may not be restricted "in order to enhance the relative influence of others.").

States engaging in partisan gerrymandering accord their citizens differential treatment based on whether their viewpoints are favored or disfavored by those in power. Past expression—namely, voting history—is used to determine how best to serve the governing party's interests. *See Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018). Legislators rely on computer software that overlays state maps with voters' political data to determine the partisan impact on a proposed district of adding or removing voters in groups as small as a block.[6] Citizens with favored views are assembled into districts in a manner most likely to ensure that their preferred candidates will prevail and their political views carry the day. Citizens with disfavored views are "packed," "cracked," or otherwise assigned to districts in ways designed to minimize their political efficacy and defeat their political views. Partisan gerrymandering is thus unambiguously an official act of viewpoint discrimination.

That is precisely what Maryland and North Carolina did here. The states relied on citizens' past voting history to classify them by viewpoint, and then used that classification to decide whether those

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[6] Michael Wines, *Just how Bad is Partisan Gerrymandering? Ask the Mapmakers*, N.Y. TIMES (Jan. 29, 2018), https://www.nytimes.com/2018/01/29/us/gerrymander-political-maps-maryland.html.

citizens should receive favored or disfavored treatment in the redistricting process. *See Benisek v. Lamone*, 348 F. Supp. 3d 493, 503 (D. Md. 2018); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018). This type of state action is, by its very nature, at war with the First Amendment.

In Maryland, the challenged congressional districts were drawn using partisan data, including past voting history. *Benisek*, 348 F. Supp. 3d at 503-04. The draft map shown to the state's most senior Democratic leaders was paired with "party registration data and voter turnout data," to develop the final map. *Id.* at 504. Explicit statements by lawmakers and other public officials confirmed the intention to use this information to draw districts in such a manner that the speech preferred by the legislature would prevail in Maryland's Sixth District. *Id.* at 498 (describing undisputed evidence in the record demonstrating legislative intent to disfavor Republican voters). The record findings leave no doubt that Maryland assigned its citizens to election districts based on their political viewpoints.

The North Carolina record demonstrates the same practice. The consultant employed by the North Carolina Redistricting Committees consciously employed "past election data to draw maps that were more favorable to Republican candidates." *Rucho*, 318 F. Supp. 3d at 804 (internal quotation marks omitted). After a federal district court struck down parts of that plan as an illegal racial gerrymander, the chairs of the Redistricting Committees again directed the consultant "to use political data," specifically precinct-level election results, to draw a remedial map. *Id.* at

805. Subsequently, the joint Redistricting Committee adopted districting criteria that relied *only* on population and past election data and that *explicitly* sought to maintain a partisan makeup of 10 Republicans and 3 Democrats. *Id.* at 807-08; *cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (finding the statute viewpoint discriminatory where the legislature's "stated purposes" were to "target [certain] speakers and their messages for disfavored treatment"). The record findings conclusively demonstrate the North Carolina legislature's use of citizens' viewpoints as the basis for their treatment in the redistricting process.

The process used by each state in drawing the district maps, as well as explicit statements by lawmakers and other public officials, lays bare the legislatures' discrimination against voters on the basis of viewpoint: they assigned citizens disparate treatment based on past expressed views for the purpose of diluting disfavored speech in upcoming elections. In this way, partisan gerrymandering works a double First Amendment injury: it punishes past speech by burdening future speech. Such disfavored treatment imposed because of viewpoint violates the First Amendment. *See Citizens United*, 558 U.S. at 336-37.

The Court need not evaluate the efficacy of a partisan gerrymander to recognize it as viewpoint discrimination. [7] The First Amendment broadly prohibits state action constituting viewpoint

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[7] *See generally* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993 (2018).

discrimination regardless of whether that state action achieves its intended effects.[8] The same principle applies to partisan gerrymanders: intentional efforts to discriminate on the basis of viewpoint violate the First Amendment, regardless of whether they succeed. Viewpoint discrimination itself undermines our democracy, in every form it takes, including the partisan gerrymander.

Moreover, quite apart from the vote-dilution, retaliation, and associational harms such viewpoint discrimination inflicts, partisan gerrymanders work a further harm by signaling to whom a district does—and does not—"belong." As the Court has recognized in the context of racial gerrymandering, gerrymandered districts send a message to elected officials about their obligations. Where legislatures draw district boundaries to favor a particular group at the expense of others, legislators understand "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. 630, 648 (1993). The "signaling" effected by the gerrymander, therefore, creates an independent representational harm. *Id.* at 650. While the Court decided *Shaw* on Fourteenth Amendment grounds, the logic applies equally to First Amendment claims: whenever the state draws district boundaries with the intent to favor one political party, the legislature conveys a message about whom the representative's "real" constituents are. That devalues the votes—and therefore the speech—of some constituents so that

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[8] *See* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Partisanship*, 116 MICH. L. REV. 351, 379-81, 403 (2017) (providing examples).

others' speech may be more effective. The same representational harms identified in *Shaw*, therefore, inhere in partisan gerrymanders.

At bottom, drawing district lines with the intention of ensuring victory for candidates of a particular political party is nothing less than imposing restrictions on disfavored views and elevating the influence of the governing party's voters at the expense of others. Such governmental conduct would not be countenanced with respect to any other form of political speech protected by the First Amendment. It is "wholly foreign to the First Amendment." *McCutcheon*, 572 U.S. at 207 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

C. Partisan Gerrymandering Does Not Survive Strict Scrutiny

As viewpoint discrimination, partisan gerrymanders must survive strict scrutiny in order to pass constitutional muster.[9] Few, if any, viewpoint discriminatory laws are sufficiently justified under this standard. *Sorrell*, 564 U.S. at 571. Indeed, "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828. To overcome this strong presumption against their constitutionality, the Maryland and North Carolina maps must be shown to be "the least restrictive means of achieving a

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[9] Even viewing a vote as expressive conduct rather than pure speech, strict scrutiny applies because partisan gerrymandering is directly related to that expression. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Neither succeeds.

Both Maryland and North Carolina have failed to demonstrate any legitimate, let alone compelling, interest to justify their gerrymandered districts. Their sole interest in using citizen's political viewpoints when drawing these districts was to create partisan advantage. *See* Rucho App. Br. 22. To state the obvious, "partisan advantage" is hardly a compelling governmental interest. Partisan advantage is simply a restatement of legislative intent to impose disfavored treatment on voters expressing disfavored views—the very definition of viewpoint discrimination. Where a viewpoint-discriminatory regulation "has a speech-based restriction as its sole rationale and operative principle," the state has plainly failed to offer a permissible justification. *Rosenberger*, 515 U.S. at 834.

The Maryland appellants gesture to hypothetical interests that might be served by some other theoretical use of partisan data, such as an interest in mimicking proportional representation or undoing prior partisan gerrymanders, but they offer no defense of the challenged map on these grounds.[10] *See* Lamone App. Br. 37-42. Without a compelling governmental interest justifying the gerrymanders at

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[10] The Court need not consider here whether using political data to accomplish such "egalitarian" interests would necessarily trigger a First Amendment strict scrutiny analysis, or whether a lower standard of scrutiny might be warranted. *Cf. Rosenberger*, 515 U.S. at 831 (discrimination consists of "disfavored treatment" imposed on speakers because of their viewpoint).

issue, appellants fail to meet the demanding standard to justify viewpoint discrimination.

The Court need not reach the least-restrictive-means analysis because appellants have failed to offer any compelling interest. Were the Court to reach the tailoring prong, however, both gerrymanders again would fail. To the extent appellants offer any compelling justification for their partisan gerrymanders, neither has explained how any such hypothetical interest requires discriminating against citizens on the basis of viewpoint.

Because the partisan gerrymanders neither serve a compelling interest nor are narrowly tailored, the judgments below should be affirmed under well-established First Amendment principles.

II. First Amendment Scrutiny Offers The Appropriate Framework For Determining The Constitutionality Of Partisan Gerrymandering

A. Settled First Amendment Doctrine Provides A Workable Standard For Legislatures And Courts

The application of long-established and repeatedly applied First Amendment principles to assess the constitutionality of legislative redistricting would not interfere with the consideration of myriad factors long-approved by this Court, such as contiguity, compactness, political subdivisions, communities of

interest,[11] conformity with geographic features, and equality of population—all of which the Court has accepted as legitimate, *see, e.g.*, *Shaw*, 509 U.S. at 647 (describing "traditional districting principles"), or required, *see, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (requiring "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable"). Such considerations do not involve line-drawing on the basis of First Amendment-protected expression. Thus, a First Amendment viewpoint discrimination analysis is well-suited to maintaining state legislatures' ability to rely on traditional districting principles—including considerations thought to be "political"—when drawing district lines.

First Amendment scrutiny of partisan gerrymanders is also entirely compatible with state legislatures' broad constitutional authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. 1, § 4, cl. 1. This authority permits states to impose "'*reasonable, nondiscriminatory* restrictions' upon the First and Fourteenth Amendment rights of voters." *Burdick*, 504 U.S. at 434 (emphasis added) (quoting *Anderson v.*

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[11] Respect for "communities of interest" cannot justify drawing district lines on the basis of political viewpoint. Accounting for "communities of interest" means that districts should be drawn so that persons residing within a district share social, cultural, and economic interests in common. *See, e.g.*, MICH. CONST. art. IV, § 6, cl. 13(c) (requiring districts to reflect communities of interest, which include "populations that share cultural or historical characteristics or economic interests," but expressly "do not include relationships with political parties, incumbents, or political candidates").

Celebrezze, 460 U.S. 780, 788 (1983)). The Elections Clause allows states to regulate the mechanics of voting, even if the result has some impact on voter expression. It does not, consistent with the First Amendment, permit states to enact election regulations that discriminate against voters on the basis of viewpoint. *See McIntyre*, 514 U.S. at 345 (contrasting permissible measures to "control the mechanics of the electoral process" with the impermissible "regulation of pure speech"). Much as states may regulate expressive conduct "because of the action it entails, but not because of the ideas it expresses," so too states may regulate the mechanics of voting for the legal process it entails, but not for the political message it expresses. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). This Court has already affirmed as much, having held that "severe" restrictions on the First Amendment at the ballot box are subject to strict scrutiny, unlike nondiscriminatory ones. *Burdick*, 504 U.S. at 434 (citing *Norman v. Reed*, 504 U.S. 279, 289 (1992)).

Likewise, First Amendment principles are judicially manageable and thus allay concerns that courts lack administrable standards under the Equal Protection Clause to review partisan gerrymandering claims. Some members of this Court have in the past queried whether any workable standard could be articulated. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion); *id.* at 311 (Kennedy, J., concurring); *Davis v. Bandemer*, 478 U.S. 109, 155 (1986) (O'Connor, J., concurring). Relying on established First Amendment doctrine provides clear guidelines for courts when called upon to adjudicate partisan gerrymandering claims.

A First Amendment framework does not require courts to police a standard that is unduly vague. As Justice Scalia wrote in *Vieth*, "the vaguer the test for availability, the more frequently interest rather than necessity will produce litigation." 541 U.S. at 300-01. Fortunately, the First Amendment provides a bright line rule: intentionally targeting individuals because of their partisan views and prior voting history constitutes viewpoint discrimination and is subject to strict scrutiny. Far from "attempt[ing] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States," *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), this rule only forbids insidious and deliberate viewpoint discrimination in the districting process.[12] A First Amendment framework is thus not only constitutionally mandated here, it is also both familiar to the courts and proven to be judicially administrable.[13]

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[12] In *Gaffney*, a Fourteenth Amendment case, this Court held that a redistricting map designed to achieve rough proportional representation did not offend the Equal Protection Clause because it aimed "not to minimize or eliminate the political strength of any group or party, but to recognize it." 412 U.S. at 754. *Gaffney* also confirmed that it would constitute "invidious[] discriminat[ion] . . . to minimize or cancel out the voting strength of . . . political elements of the voting population." *Id.* at 751 (internal quotation marks omitted).

[13] Indeed, this test is more manageable than the standard for scrutinizing a racial gerrymander, which requires courts to inquire into legislative motive, the predominance of racial considerations, and the interaction between federal statutory law and the Fourteenth Amendment, among other complex questions.

B. The Historical Practice Of Partisan Gerrymandering Does Not Shield It From First Amendment Scrutiny

The long-standing practice of partisan gerrymandering by some states provides no justification for its constitutionality. This is especially true here where the historical record demonstrates persistent rejection of its constitutionality from the outset. Indeed, the history of partisan gerrymandering is a history of constitutional condemnations of the practice.

The first alleged partisan gerrymander, involving Virginia's 1788 districting, was decried by residents as an effort to thwart the nascent Constitution, and by newspapers as "a violation of the right of a free people . . . to choose their representatives."[14] A quarter century later, the portmanteau "Gerry-mander" was coined to describe an audacious map, approved by Massachusetts Governor Elbridge Gerry, that was so arched and contorted it resembled a salamander. That map was immediately and resoundingly denounced as a "grievous wound on the Constitution,—it in fact subverts and changes our Form of Government."[15] The Federalists viewed the map as "a blow at the constitution and a travesty upon the Bill of Rights," and a petition presented to the

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[14] ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 40-41 (1907); *see also* Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUD. 781 (2011).

[15] *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813.

Massachusetts legislature to redraw the district characterized the map as "unconstitutional, unequal, and unjust."[16] The *Boston Gazette* attributed the results of the subsequent election to the "unconstitutional hackings and hewings of the state."[17] Where the same stunt was attempted in other states over the next several decades, the reaction was the same: partisan gerrymanders are an abuse of power and "an attempt to deprive the people of their rights."[18]

Courts too have long viewed the practice of partisan gerrymandering as constitutionally suspect. In state law challenges to the practice following the end of Reconstruction, courts described partisan gerrymanders as abhorrent to the Constitution. *See, e.g., Parker v. State ex rel. Powell*, 32 N.E. 836, 846 (Ind. 1892) (Elliott, J., concurring) (observing that those "who framed our constitutional system knew and provided against the dangers of legislative usurpation of power, and the wisest among them united in devising checks upon it."); *State ex rel. Attorney Gen. v. Cunningham*, 51 N.W. 724, 730 (Wis. 1892). This Court has long evinced the same skepticism and never endorsed the practice. In fact, it has searched for decades for the right case in which to assess the constitutionality of partisan gerrymandering. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018); *League of United Latin Am. Citizens v. Perry*,

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[16] GRIFFITH, *supra*, at 70-71.

[17] *Id.* at 89.

[18] *Id.* at 106; *see also* Brief of Amici Curiae Historians in Support of Appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311107.

548 U.S. 399 (2006); *Vieth*, 541 U.S. 267; *Bandemer*, 478 U.S. 109.

It is thus entirely consistent with the Founding era's public understanding of the Constitution to hold that partisan gerrymandering violates the rights secured by the Constitution, and it coheres with the understanding of jurists and citizens alike since that time that this practice "is wholly foreign" to the republican system of government the Constitution established. *Buckley*, 424 U.S. at 49; *cf. Wesberry*, 376 U.S. at 7-18 (relying on the historical record of constitutional skepticism of malapportionment to hold that longstanding practice unconstitutional).

Even without such continuous concern over the constitutionality of a practice, an appeal to history alone cannot spare an unconstitutional governmental action. The longstanding use of a governmental practice, even on a widespread basis, does not prevent this Court from inquiring into its constitutionality or immunize it from judicial intervention. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 944-45 (1983).

This Court has not shied away from striking down longstanding political practices for failing to meet the Constitution's mandates, even while expressly acknowledging their longevity. For example, in *Reynolds v. Sims*, the Court reiterated its commitment to the Constitution over convention by holding that the Equal Protection Clause requires state legislative districts to contain substantially equal populations. 377 U.S. at 568. In so holding, the Court explicitly rejected the argument that the historical longevity of malapportionment bore on its constitutional analysis: "neither history alone, nor

economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Id.* at 579-80 (footnote omitted). Indeed, the Court made clear that when "[t]he complexions of societies and civilizations change . . . [r]epresentation schemes once fair and equitable become archaic and outdated." *Id.* at 567. What remains constant is the fundamental principle that "the weight of a citizen's vote cannot be made to depend on where he lives." *Id.*

In similar fashion, this Court has not hesitated to strike down racial gerrymandering as unconstitutional under both the Fourteenth and Fifteenth Amendments, notwithstanding its pervasiveness "[f]or much of our Nation's history," including "in parts of this country nearly a century after ratification of the Fifteenth Amendment." *Shaw*, 509 U.S. at 639-40. In a direct rejection of this protracted and ubiquitous practice, the Court perceived it posed "the risk of lasting harm to our society," and demanded such gerrymanders be held to strict scrutiny. *Id.* at 657.

Likewise, in a run of three cases over more than a decade, this Court excised the deeply entrenched practice of political patronage as a violation of the First Amendment, notwithstanding its long-running history "at the federal level at least since the Presidency of Thomas Jefferson." *Elrod v. Burns*, 427 U.S. 347, 353 (1976); *see also Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). The Court's elimination of this two-

hundred-year practice swatted down the notion that historical longevity counsels judicial restraint:

> Our inquiry does not begin with the judgment of history, though the actual operation of a practice, viewed in retrospect, may help to assess its workings with respect to constitutional limitations. *Compare Brown v. Board of Education*, 347 U.S. 483 (1954), *with Plessy v. Ferguson*, 163 U.S. 537 (1896). Rather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice.

Elrod, 427 U.S. at 354-55. In keeping with its role as the guardian of the First Amendment's guarantee of free participation in our democracy, this Court should now hold partisan gerrymandering unconstitutional.

* * *

The First Amendment categorically forbids viewpoint discrimination because it is fundamentally incompatible with democratic self-government. "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. Left unchecked, viewpoint-discriminatory gerrymanders invert the relationship between citizens and their elected representatives, who no longer "have an immediate dependence on, and an intimate sympathy with, the people." THE FEDERALIST NO. 52 (James Madison). Instead, citizens depend on governmental approval of their

speech to effectively exercise the right to participate in electing our political leaders. "[S]uch basic intrusion by the government into the debate over who should govern goes to the heart of the First Amendment." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011).

CONCLUSION[19]

This Court should affirm the decisions of the district courts and hold that partisan gerrymandering violates the First Amendment.

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